

1 ANDREW R. LIVINGSTON (State Bar No. 148646)  
alivingston@orrick.com  
2 ERIN M. CONNELL (State Bar No. 223355)  
econnell@orrick.com  
3 ORRICK, HERRINGTON & SUTCLIFFE LLP  
The Orrick Building  
4 405 Howard Street  
San Francisco, CA 94105-2669  
5 Telephone: +1-415-773-5700  
Facsimile: +1-415-773-5759  
6

Attorneys for Defendants  
7 Chase Home Finance, LLC (on behalf of itself and as successor  
in interest to Chase Manhattan Mortgage Corporation) and  
8 James Boudreau

9  
10 UNITED STATES DISTRICT COURT  
11 SOUTHERN DISTRICT OF CALIFORNIA

12 CHRISTOPHER CLARK and JAMES  
13 RENICK, individuals,

14 Plaintiffs,

15 v.

16 CHASE HOME FINANCE, LLC, a Delaware  
LLC doing business in California; CHASE  
17 MANHATTAN MORTGAGE  
CORPORATION, a New Jersey corporation  
18 doing business in California; JAMES  
BOUDREAU, an individual; and DOES 1-25,

19 Defendants.  
20  
21  
22  
23  
24  
25  
26  
27  
28

Case No. 08 CV 0500 JM RBB

**EX PARTE APPLICATION OF  
DEFENDANTS CHASE HOME  
FINANCE, LLC, CHASE  
MANHATTAN MORTGAGE  
CORPORATION AND JAMES  
BOUDREAU FOR ORDER  
CONSOLIDATING THE HEARINGS  
ON PLAINTIFFS' MOTION TO  
REMAND TO STATE COURT AND  
DEFENDANTS' MOTION FOR  
JUDGMENT ON THE PLEADINGS;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Dept.: 16  
Judge: The Hon. Jeffrey T. Miller

**If hearing required, telephonic  
appearance requested**

Defendants Chase Home Finance, LLC (“Chase”) (on behalf of itself and as successor in interest to Chase Manhattan Mortgage Corporation (“Chase Mortgage”)) and James Boudreau (“Boudreau”) (collectively, “Defendants”) hereby submit the following *Ex Parte* Application requesting an order consolidating the hearings on Plaintiffs’ Motion To Remand To State Court and Defendants Motion For Judgment On The Pleadings Pursuant to Rule 12(c) Or, In The Alternative, For Partial Summary Judgment Pursuant To Rule 56. The grounds for this *Ex Parte* Application are fully set forth in the attached memorandum of points and authorities, as well as in the supporting Declaration of Erin M. Connell.

### **MEMORANDUM OF POINTS AND AUTHORTIES**

#### **I. INTRODUCTION**

Two motions are currently pending before the Court: Plaintiffs’ Motion To Remand To State Court, and Defendants’ Motion For Judgment On The Pleadings Or, In The Alternative, For Partial Summary Judgment. Because defense counsel is not available on the date on which Plaintiffs unilaterally noticed their remand motion, because some of the exact same legal issues need to be adjudicated in both motions, and because counsel for both parties are located out of town, the interests of efficiency and judicial economy constitute good cause to consolidate the hearings on the two pending motions and to have them heard on **May 30, 2008**.

Plaintiffs Christopher Clark (“Clark”) and James Renick (“Renick”) are former employees of Defendant Chase Home Finance, LLC (“Chase”). Their employment with Chase ended more than three years ago. Nevertheless, they are now pursuing claims for wages and penalties under the California Labor Code and Business & Professions Code Section 17200, two of which are time barred as a matter of law, and none of which may be sustained against individual defendant James Boudreau (“Boudreau”).

Recognizing that Boudreau is a fraudulent defendant, Defendants removed the case to federal court. Defendants also promptly filed a Motion For Judgment On The Pleadings seeking to dismiss all of Clark’s claims, as he undisputedly signed a Release Agreement releasing them. Defendants’ motion also seeks to dismiss both Plaintiffs’ penalty claims as they are time barred as

1 a matter of law.

2 Defense counsel is not available on the date on which Plaintiffs' remand motion is set for  
3 hearing: May 16, 2008. Because defense counsel is located in San Francisco, and because the  
4 hearing on Defendants' Motion for Judgment On The Pleadings is scheduled for May 30, 2008,  
5 Defendants have asked Plaintiffs to consolidate the hearings on both motions so that they both  
6 can be heard on May 30, 2008. Plaintiffs will not agree to do so. Rather, Plaintiffs insist that if  
7 Plaintiffs continue their hearing, Defendants need to do the same. Because continuing both  
8 hearings defeats the purpose of furthering efficiency and judicial economy, Defendants are left  
9 with no choice but to seek the present *ex parte* relief asking the Court to consolidate the hearings  
10 on the parties' two pending motions.

## 11 **II. RELEVANT FACTS AND PROCEDURAL HISTORY**

12 Plaintiffs served Defendants with their First Amended Complaint on March 11, 2008. *See*  
13 Declaration of Erin M. Connell In Support of Defendants' *Ex Parte* Application For Order  
14 Continuing Hearing On Plaintiffs' Motion To Remand ("Connell Decl."), ¶ 2. Plaintiffs allege  
15 six causes of action for wages and penalties under the California Labor Code and Business &  
16 Professions Code Section 17200 against their former employers Chase & Chase Manhattan, and  
17 against their former supervisor James Boudreau. *See* FAC. On March 18, 2008, Defendants  
18 removed this case to federal court on the grounds that Boudreau is a fraudulent defendant. *See*  
19 Connell Decl., ¶ 3.

20 On April 18, 2008, Plaintiffs filed a Motion To Remand. *See* Connell Decl., ¶ 4.  
21 Plaintiffs noticed their Motion To Remand for hearing on May 16, 2008, the earliest possible date  
22 on which the motion could be heard. *See* Connell Decl., ¶ 4; Local Civil Rule 7.1 (e)(1) (motions  
23 require a minimum notice of 28 calendar days). Plaintiffs argue in their Motion To Remand that  
24 Boudreau is not a fraudulent defendant because there is a "possibility" that they may proceed  
25 against Boudreau with their sixth cause of action for civil penalties under California Labor Code  
26 Sections 558 and 2699, and their fifth cause of action for unfair competition under Business &  
27 Professions Code Section 17200 ("Section 17200"). *Id.*

28 On April 25, 2008, Defendants filed a Motion For Judgment On The Pleadings Pursuant

1 To Rule 12(c) Or, In The Alternative, Motion For Partial Summary Judgment Pursuant To Rule  
2 56. *See* Connell Decl., ¶ 5. Defendants noticed their motion for the next available hearing date:  
3 May 30, 2008. *See* Connell Decl., ¶ 5. Defendants argue in their Motion that all six of Clark's  
4 claims must be dismissed because he undisputedly released them when he signed a Release  
5 Agreement as part of the severance package he accepted from Chase. *See* Connell Decl., ¶ 5.  
6 Defendants also argue that Clark's and Renick's third and sixth causes of action seeking penalties  
7 must be dismissed because they undisputedly are time barred. *Id.*

8 Also on April 25, 2008, Ms. Connell telephoned Plaintiffs' counsel, Gregory Douglas, to  
9 inform him that Ms. Connell and Mr. Livingston, the two attorneys working on this case and most  
10 capable of arguing the Motion to Remand, have prior obligations that conflict with the May 16,  
11 2008 hearing date. *See* Connell Decl., ¶ 6. Ms. Connell asked Mr. Douglas if Plaintiffs would be  
12 willing to continue their hearing date until May 30, 2008, so that both motions could be heard on  
13 the same date. *Id.* Plaintiffs' counsel responded that although Plaintiffs would likely agree to  
14 continuing the hearing date on the Motion to Remand, Plaintiffs wanted Defendants to also  
15 continue the hearing date on Defendants' Motion For Judgment On The Pleadings. *Id.* Plaintiffs'  
16 counsel further explained that he did not want to spend the time opposing Defendants' motion in  
17 the event that it becomes "moot" if the Court grants Plaintiffs' Motion To Remand. *Id.*

18 After taking some time to consider Defendants' request, Plaintiffs would not agree to  
19 consolidate the hearings. *See* Connell Decl., ¶ 8. Accordingly, on May 1, 2008 (and again on  
20 May 5, 2008), Ms. Connell gave Mr. Douglas notice of this *ex parte* application, which  
21 Defendants anticipate Plaintiffs will oppose. *See* Connell Decl., ¶¶ 8, 10 & Ex. A.

22 Also on May 1, 2008, Defendants filed their Opposition To Plaintiffs' Motion To  
23 Remand. *See* Connell Decl., ¶ 9. One of the key arguments in Defendants' Opposition is that the  
24 Motion to Remand must be denied because Plaintiffs' sixth cause of action against Boudreau is  
25 time barred (*i.e.*, the exact same argument Defendants make in their Motion For Judgment On  
26 The Pleadings). *Id.*

27 ///

28 ///

### III. GOOD CAUSE EXISTS TO GRANT THE *EX PARTE* RELIEF SOUGHT

#### A. Good Cause Exists To Consolidate The Hearings On Plaintiffs' Motion To Remand And Defendants' Motion For Judgment On The Pleadings

"Absent a lack of diligence or other abusive circumstances which are not present in this case, a request for a continuance supported by a showing of good cause usually ought to be granted." *Oliveros v. County of Los Angeles*, 120 Cal. App. 4th 1389, 1396 (2004) (quoting *Estate of Meeker*, 13 Cal. App. 4th 1099 (1993)) (internal alteration and citation omitted). An attorney's scheduling conflict is good cause for a court to grant a continuance. *See, e.g., id.* at 1399 (holding that an attorney's conflict with trial date was good cause to continue trial even though attorney was from a firm of approximately 80 lawyers). Courts recognize that "it is a fact of life that a trial lawyer's time is not his own. For while trial courts are under great pressure to manage large caseloads, so too are lawyers under equally great pressure to juggle trials in two or more courts, each presided over by a judge who sometimes has to trail cases or otherwise upset the lawyers' efforts to manage their own calendars." *Id.*

In this case, Defendants require a continuance of Plaintiffs' Motion For Remand because Plaintiffs' unilaterally scheduled it on a date when defense counsel already had prior commitments. *See Connell Decl.*, ¶¶ 4, 7. More specifically, on May 16, 2008, defense counsel are both scheduled to attend an all-day conference in San Francisco for the department at defense counsel's law firm in which both Ms. Connell and Mr. Livingston work. *See Connell Decl.*, ¶ 7. This prior obligation prevents both Ms. Connell and Mr. Livingston from attending the hearing on Plaintiffs' Motion to Remand. *Id.* This conflict constitutes good cause for the Court to grant a continuance. *Oliveros*, 120 Cal. App. 4th at 1399.

#### B. Consolidating The Hearings On The Parties' Pending Motions Serves The Interest Of Judicial Economy

In the interest of judicial economy, it makes sense for the parties to consolidate the hearings on their pending motions. Indeed, some of the very same legal issues that will be adjudicated on Plaintiffs' Motion to Remand will also be adjudicated on Defendants' Motion For Judgment On The Pleadings. *See Connell Decl.*, ¶¶ 4, 5, 9. Given the technical nature of several

1 of Plaintiffs' and Defendants' legal arguments, including arguments that focus on the viability of  
 2 claims under Section 17200 and California's Private Attorney's General Act ("PAGA"),  
 3 adjudicating both motions at the same time ensures that the Court does not waste time going over  
 4 the same facts and legal issues at one hearing, only to have to cover the same ground a couple  
 5 weeks later. *See* Connell Decl., ¶¶ 4, 5, 9.

6 **C. It Is Efficient For The Parties To Consolidate The Hearings On Their**  
 7 **Pending Motions**

8 Plaintiffs' counsel is located in Long Beach, California. *See* Connell Decl., ¶ 11. Defense  
 9 counsel is located in San Francisco, California. *See* Connell Decl., ¶ 12. Accordingly, attending  
 10 a hearing in San Diego, California requires significant travel for both sides, and entails  
 11 purchasing an airplane ticket for defense counsel. *Id.* The travel costs alone constitute good  
 12 cause for consolidating the hearings.

13 Plaintiffs' counsel argues that it does not make sense for him to spend time and resources  
 14 opposing Defendants' Motion For Judgment On The Pleadings because if Plaintiff's Motion For  
 15 Remand is granted, Defendants' motion will become "moot."

16 Plaintiffs' argument lacks merit, however, because even if the Court grants Plaintiff's  
 17 Motion To Remand, Defendants inevitably will seek the same relief in state court that are seeking  
 18 through their pending Motion For Judgment On The Pleadings. *See* Connell Decl., ¶ 13.  
 19 Accordingly, any work that Plaintiffs' counsel expends on the Opposition to Defendants' Motion  
 20 For Judgment On The Pleadings will not be moot – Plaintiffs are going to have to oppose such a  
 21 motion eventually anyway, whether it is in federal or state court.

22 **D. Defendants Will Be Prejudiced If The Hearings Are Not Consolidated**

23 Defendants will be unduly prejudiced if their counsel of choice is not present at the  
 24 hearing on plaintiff's Motion to Remand. Ms. Connell and Mr. Livingston are the only two  
 25 attorneys at their law firm who have worked on this case. Connell Decl., ¶ 14. Thus, they are the  
 26 only two attorneys with any familiarity with the issues to be adjudicated in connection with  
 27 Plaintiffs' Motion To Remand and are the most capable of arguing this important motion. *Id.*  
 28 "Lawyers are not fungible." *Oliveros*, 120 Cal. App. 4th at 1397 (rejecting trial court's

1 contention that a different attorney from the same firm, who is unfamiliar with the case, could  
2 simply stand in for the attorney with the schedule conflict). Defendants have every right to have  
3 their counsel present at the hearing on plaintiff's Motion – a motion that, from Defendants'  
4 perspective, is extremely important to the case. Connell Decl., ¶ 14.

5 Similarly, Defendants will be prejudiced by having the hearing on their Motion For  
6 Judgment On The Pleadings continued. Not only is it extremely inefficient to have defense  
7 counsel fly down to San Diego twice in one month for hearings on motions involving some of the  
8 very same legal issues, but Defendants have a right to have their motion adjudicated as soon as  
9 possible. Given Defendants' position that more than half the claims at issue in this case are either  
10 released or time barred, Defendants had little choice but to file the pending Motion For Judgment  
11 On The Pleadings. Adjudication of Defendants' motion should not be delayed further, simply  
12 because Plaintiffs' counsel does not want to spend time opposing Defendants' motion.

13 **E. Consolidating The Hearings Will Not Prejudice Plaintiffs**

14 Finally, neither Plaintiffs nor their counsel will be prejudiced by consolidating the  
15 hearings on the parties' pending motions. Indeed, even though Plaintiff's counsel stated that any  
16 continuance of Plaintiffs' motion would be contingent on a continuance of Defendants' motion,  
17 Plaintiffs' counsel did agree that Plaintiffs would continue their hearing date (thereby illustrating  
18 that the two week delay is of no consequence to Plaintiffs). Further, as set forth in Section III, C,  
19 *supra*, Plaintiffs are going to have to oppose Defendants' motion eventually anyway, so any  
20 argument that Plaintiffs will be prejudiced by consolidating the hearings is baseless.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **IV. CONCLUSION**

2 For the forgoing reasons, Defendants respectfully request that the Court grant the *ex parte*  
3 relief they seek, and consolidate the hearings on Plaintiffs' Motion To Remand and Defendants'  
4 Motion For Judgment On The Pleadings so that both motions are heard on **May 30, 2008**.

5 Dated: May 6, 2008

6 ANDREW R. LIVINGSTON  
7 ERIN M. CONNELL  
8 ORRICK, HERRINGTON & SUTCLIFFE LLP

9 By: /s/ Erin M. Connell  
10 Erin M. Connell  
11 Attorneys for Defendants  
12 Chase Home Finance, LLC (on behalf of itself  
13 and as successor in interest to Chase  
14 Manhattan Mortgage Corporation)  
15 and James Boudreau  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28